In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-789

RICHARD HAYDEN,

Petitioner

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT
OF APPEAL, FLORIDA

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QUESTIONS PRESENTED

1. WHETHER, CONSISTENT WITH THE SIXTH AND FOURTEENTH AMENDMENTS AND THIS COURT'S DECISION IN *Stromberg v. California*, 283 U.S. 359 (1931), A TRIAL COURT CAN REFUSE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT OF THE CRIMES CHARGED, TO WIT, CRIMINAL INTENT, AND AN APPELLATE COURT AFFIRM THE RESULTING CONVICTION WHEN THERE IS NO WAY OF TELLING FROM THE JURY'S GENERAL VERDICT THAT IT DISREGARDED THE

ERRONEOUS LAW AND INSTEAD CONVICTED ON THE BASIS OF AN ALTERNATIVE THEORY OF GUILT, TO WIT, AIDING AND ABETTING, AS TO WHICH IT WAS CORRECTLY INSTRUCTED?

2. WHETHER THE RECORD EVIDENCE IS SUFFICIENT TO REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT WHEN THE PROSECUTION'S OWN EVIDENCE SHOWS THAT PETITIONER NEVER EXERCISED DOMINION AND CONTROL OVER THE MARIJUANA ON THE SHIP AND THAT HE NEVER HAD ANY INTENT TO POSSESS OR IMPORT THE MARIJUANA?

3. WHETHER THE EIGHTH AND/OR FOURTEENTH AMENDMENTS ARE VIOLATED BY STATE PENAL STATUTES CONSTRUED AND APPLIED TO IMPOSE STRICT CRIMINAL LIABILITY AND SEVERE FELONY PENALTIES UPON A NON-INTENTIONAL, UNWITTING AND UNWILLING INDIVIDUAL -- IN THIS CASE A PASSENGER

ON A MARIJUANA SMUGGLING SHIP -- FOR POSSESSION BASED DRUG CRIMES?

4. WHETHER ONCE A SHIP IS REDUCED TO THE DOMINION AND CONTROL OF THE AUTHORITIES, IT IS IMMOBILIZED AND NO EXIGENT CIRCUMSTANCES REMAIN, MAY WARANTLESS SEARCHES OF AND SEIZURES FROM THE SHIP'S REPOSITORIES NONETHELESS BE CONDUCTED WITHOUT OFFENDING THE FOURTH AMENDMENT?

5. WHETHER SEARCHES MADE BY OFFICERS AND PURSUANT TO AN UNCONSTITIONAL AND INVALID ADMINISTRATIVE REGULATION AUTHORIZING THEM TO CONDUCT WARANTLESS SEARCHES WITHOUT PROBABLE CAUSE, ARTICULABLE SUSPICIONS, OR ANY OTHER STANDARD OF INDIVIDUALIZED OBJECTIVE FACTS CAN, CONSISTENT WITH THE POLICIES OF THE FOURTH AMENDMENT, BE VALIDATED

AFTER THE FACT BY A HINDSIGHT JUDICIAL DETERMINATION OF PROBABLE CAUSE SUBSTITUTED FOR THE OFFICERS'OWN EXERCISE OF PROPER DISCRETION?

6. WHETHER THE ADMINISTRATIVE LAW DOCTRINE THAT "THE GROUNDS UPON WHICH AN ADMINISTRATIVE ORDER MUST BE JUDGED ARE THOSE UPON WHICH THE RECORD DISCLOSES THAT ITS ACTION WAS BASED", *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1947), SHOULD BE INCORPORATED INTO FOURTH AMENDMENT LAW AS A RULE BY WHICH THE ACTIONS OF OFFICIALS SHOULD BE REVIEWED AT HEARINGS UPON A MOTION TO SUPPRESS EVIDENCE?

7. WHETHER THE INITIAL BOARDING AND SEARCH OF THE SHIP IN THIS CASE WAS SUPPORTED BY PROBABLE CAUSE?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i-iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1-9
STATEMENT OF THE CASE	9-27
REASONS WHY THE WRIT SHOULD BE DENIED	27-40
CONCLUSION	40
CERTIFICATE OF SERVICE	41-42

TABLE OF CITATIONS

	PAGE
Askew v. State 118 So. 2d 219 (Fla. 1960)	1
Aylin v. State, 362 So. 2d 435 (Fla. 1st DCA 1978)	32
Beasley v. State, 382 So. 2d 47 (Fla. 2d DCA 1980).	32
Chewning v. State, 366 So. 2d 144 (Fla. 1st DCA 1979)	32
Hayden v. State, 372 So. 2d 444 (Fla. 1979)	1
Higgins v. Wainwright, 424 F. 2d 177 (5th Cir. 1970)	29
Jackson v. Virginia, 443 U.S. 307 (1979)	34
Pleas v. Wainwright, 441 F. 2d 56 (5th Cir. 1971)	29
Reinersman v. State 382 So. 2d 325 (Fla. 2d DCA 1980)	32
Larry Rich and Dennis Allen Roth v. State of Florida, Case 80-557	37.38, 39,40
Schueren v. State, 370 So. 2d 83 (Fla. 1st DCA 1979)	32

	Page
SEC v. Chenery, 318 U.S. 80,87 (1947)	iv
State v. Beasley, Case 59,085	32
State v. Brady, Case 59,054	32
State v. Brady, 379 So. 2d 1294 (Fla.4th DCA 1980)	32
State v. Medlin. 273 So.2d 394 (Fla. 1974)	31,36
State v. Reinersman. Case 59,097	32
Stromberg v. California, 283 U.S. 359 (1931)	27,28
United States v. International Minerals and Chemical Corp., 402 U.S. 558 (1971)	

	Page
Constitutional Provisions:	
Fourth Amendment, Constitution of the United States	1-2
Sixth Amendment, Constitution of the United States	2
Eighth Amendment, Constitution of the United States	2
Fourteenth Amendment, Constitution of the United States.	2-3
Statutes and Rules:	
28 U.S.C. §1257(3)	1
§370.021, Florida Statutes	5,8
893.13, Florida Statutes	3,5, 29,30, 31,33
Florida Seafood Quality Control Code 16B-27.23	8

OPINIONS BELOW

The Florida Supreme Court's decision in *Hayden v. State* is reported at 372 So. 2d 444 (Fla. 1979). The per curiam affirmation in *Hayden v. State* is reported at 380 So. 2d 588 (Fla. 2d DCA 1979).

JURISDICTION

To the extent that a substantial federal question may be presented, jurisdiction is properly invoked under 28 U.S.C. §1257(3)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes

Section 893.13 Prohibited Acts: penlaties. ---1

(1)(a) Except as authorized by this chapter and chapter 500, it is unlawful for any person to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:

* * *

2. A controlled substance named or described in s. 891.03 (1)(c),(2)(c),or (4), is guilty of

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1/ Florida Statutes, Section 893.13(1)(a) 2 has been subsequently amended to authorize a special sentencing structure in cases involving in excess of 100 pounds of cannabis, pursuant to Florida's new "Trafficking" statute. §893.135 (Fla. Stat., Chapter 79-1, Laws of Florida.

a felony in the third degree, punishable as provided in s. 775.081, s. 775.083, or s. 775.084; except that the sale, delivery, or possession of in excess of 100 pounds of cannabis as controlled in s. 893.03(1) (c) shall constitute a felony of the second degree, punishable as provided in s. 775.-082, s. 775.083 or s. 775.084.

* * *

(d) It is unlawful for any person to bring into this state any controlled substance unless the possession of such controlled substance is authorized by this chapter or unless said person is licensed to do so by the appropriate federal agency. Any person who violates this provision with respect to:

* * *

2. A controlled substance named or described in s. 893.03 (1)(c), (2)(c), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

* * *

(e) It is unlawful for any person to be in actual or constructive possession of a controlled

substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or 775.084.

* * *

Section 370.021 Administration, rules, regulations, etc.

(1) Rules and regulations. -- The department of natural resources shall make, adopt and promulgate, amend and repeal all rules and regulations necessary or convenient for the carrying out of the duties, obligations, powers and responsibilities conferred on said department or any of its divisions. The director of each division shall submit to the department suggested rules and regulations for that division. Any person violating or otherwise failing to comply with any of the rules and

regulations adopted as aforesaid shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or 775.-083, unless otherwise provided by law.

* * *

(5) Powers of Officers, ---[2] The department may designate such employees of the several divisions, as it may deem necessary in its discretion, as law enforcement officers, who shall meet the provisions of s. 943.13 and sub section 943.12(1) and have the powers and duties conferred on this subsection, except, that such employees shall comply with the provisions of chapter 943. Such officers, together with the executive director and the director of the Division of Marine Resources, are constituted law enforcement officers of this state with full power to investigate and arrest for any violation of the laws of this state and

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2/ This section has now been amended by Chapter 79-65, Laws of Florida, to omit from the second sentence the words "Division of Marine Resources" and to add in their stead "Department of Law Enforcement".

the rules and regulations of the department under their jurisdiction and for violations of chapter 253 and the rules and regulations promulgated thereunder. The general laws applicable to arrests by peace officers of this state shall also be applicable to such law enforcement officers. Such law enforcement officers may enter upon any land or waters of the state for performance of their lawful duties and may take with them any necessary equipment, and such entry shall not constitute a trespass. It shall be lawful for any boat, motor vehicle, or aircraft owned or chartered by the department or its agents or employees to land on and depart from any of the beaches or waters of the state. Such law enforcement officers shall have the authority, without warrant, to board, inspect, and search any boat, fishing appliance, storage or processing plant, fishhouse, spongehouse, oysterhouse, or any other warehouse, building, or vehicle engaged in transporting or storing any fish or fishery products. Such authority to search and inspect without a search warrant is limited to those cases in which such law enforcement officers have reason to believe that fish or any saltwater products are taken or kept for sale, barter

transportation, or other purposes in violation of laws or rules promulgated under this law. Any such law enforcement officer may at any time seize or take possession of any saltwater products or contraband which have been unlawfully caught, taken, or processed or which are unlawfully possessed or transported in violation of any of the laws of this state or any rule or regulation of the department. Such law enforcement officers may arrest any person in the act of violating any of the provisions of this law, rules or regulations of the department, the provisions of chapter 253 and the rules and regulations promulgated thereunder, or any of the laws of this state. It is hereby declared unlawful for any person to resist such arrest or in any manner interfere, either by abetting or assisting such resistance or otherwise interfering with any such law enforcement officer while engaged in the performance of the duties imposed upon him by law or regulation of the department.

Florida Seafood Quality Control Code

16B-27.23 Inspection of boats engaged in transporting seafood in primary or secondary production.

> The Department or its agents shall have authority, without warrant, to board, inspect and search any boat or vehicle engaged in transporting any primary or secondary seafood, as often as may be deemed necessary for enforcement of the provisions of this subsection and for protection of the public health.

STATEMENT OF THE CASE

-- The Search and Seizure --

At the hearing on the motion to suppress evidence obtained from the shrimp boat, the "Dudley," there was the following testimony:

Marine Patrol Officers McCroan and Harn were on routine patrol on February 21, 1977, and saw a large shrimp boat anchored just inside the pass in Charlotte Harbor, Lee County, Florida (R. 358-361, 443-444). The name on the boat was the "Dudley." (R.361). The outriggers were in a down position

(R. 361, 444). The boat appeared to be loaded - it was riding low in the water (R. 361-364,458). Boats in that area are usually smaller and use bait shrimp nets (R. 371,444). In the Charlotte County area of Charlotte Harbor, the law limits the size of the troll nets to 25 feet in width in order to keep large shrimp boats out of the harbor and to keep them from raking out the bottom with larger nets (R.371-372). The "Dudley" had long nets hanging from the rigging, which were larger than the usual 25 foot troll nets (R.373,444). The Charlotte County area of Charlotte Harbor has a grassy bottom and that is what makes shrimping worthwhile (R. 435). The Marine Patrol officers had been receiving complaints

about "shrimpers" in Charlotte Harbor (R.374,423). Although the boat was riding low in the water, the freezer unit motor could not be heard to be running (R.411). The "Dudley" had a commercial registration for the State of Florida on the bow of the vessel (R.364-365). When a vessel has a commercial decal, it shows that they are making more than fifty percent of their income in commercial fishing (R. 434). The patrol officers tied their boat to the stern of the "Dudley" and asked to see the vessel's registration papers (R.366-369). After checking the registration papers, the officers asked the captain if he had shrimp on board (R.366-369). The captain said that he did not (R. 369,445). The officer stated

that he boarded the vessel to check for quality control violations (R.403,406-407). The fact that Captain Rich said he had nothing aboard, although the vessel was sitting low in the water, made the officer feel that Rich was lying to him (R. 408). The officer thought that there were shrimp aboard, that the vessel was loaded with shrimp (R. 404). The officer then stated that prior to boarding the vessel, he did not hear the freezer running and he heard no bilge water being pumped out (R.415-416). This indicated a violation of the quality control code (R.415). Normally, if a vessel has ice aboard, it will be melting and is pumped out of the hold as it melts (R.416). In the absence of the sound of a

refrigerator motor noise or of bilge water being pumped out, the officer said it would indicate either that there was no ice on board or that the shrimp were floating in bilge water down in the hold (R.416). Shrimp are potentially hazardous since seafood spoils (R. 416-417). Part of a Marine Patrol officer's duties is concern with getting the product to the consumer in a wholesome manner (R.418).[3] A Marine Patrol officer can board a commercial vessel and search it for quality control code violations without a warrant (R. 431). The officers

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3/ The officers had previously testified that among other things, the duties of the Marine Patrol were to check vessels carrying seafood to see that the seafood was properly iced if it were a food source and to see that bait shrimp permits were not being used for food shrimping (R.375).

told the captain they would like to come aboard and received no response even when they again requested to come aboard (R. 369-370). The officers boarded the stern of the vessel where Captain Rich was standing (R. 380). One officer followed Rich around to the middle hold of the vessel, which was what the officer wanted to check (R. 380). When asked for permission to look into the hold Rich again did not respond (R. R.380). Nor did Rich respond to a second request (R.380-381). As the officers started to open the hold, Captain Rich advised them that he had "something illegal down there", that it was "marijuana" (R. 381). One officer stayed with Captain Rich and the other went toward the wheelhouse to call the

crew to assemble (R.381-382). The captain and crew were placed under arrest (R.383). They were given their Miranda rights (R.383,448-452). The officers checked the hold - they saw and smelled what appeared to be marijuana (R. 388,421). The vessel, with its captain and crew were taken to the phosphate docks at Boca Grande (R. 388). While they were getting underway, Captain Rich offered the officers "$20,000 cash money," and guaranteed delivery of a million more - he reached for a drawer in the vessel and opened it (R.389). The officer saw a plastic baggy of marijuana in the drawer (R. 387). Captain Rich picked it up and said, "Huh, there's another baggy." (R. 388-390). The officers had Rich put the baggy back in the drawer and close it

(R.390). At the dock, the four people comprising the captain and crew, were put in cars from the Sheriff's Department and taken to the Lee County Jail (R. 390-391).[4] The "Dudley" was in the custody of the Marine Patrol and officers searched it for money to use as evidence (R.476-477). Large amounts of money were found under a mattress pad as well as in a drawer in the pilot house (R. 477). There was a hand drawn map of a coastline and a charge card belonging to Captain Rich that was found in a wallet in another drawer in the pilot house (R.477-478). The officers had been notified to look for between $18,000 and $20,000, which

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4/ While en route to the jail, Captain Rich said he wished the officers had taken the money, and Petitioner Hayden said that he too wished they had. (R. 378)

was what was found (R. 477,485).[5] The marijuana was offloaded from the "Dudley." (R. 479). Some newspapers and portions of cardboard boxes were found in the bales during the offloading (R.480). Subsequently, on March 1, 1977, a search warrant for the "Dudley" was executed (R. 491-492).

The trial court denied the motion to suppress evidence (R. 545).

-- The Trial --

At the trial, there was testimony showing that over 17 tons of marijuana had been brought in on the "Dudley."

5/ No testimony about the money was introduced by the prosecutor at the trial (R. 166). He had instructed the witness not to go into this topic (R. 166).

(R.98, 159-160).[6] The "Dudley" was loaded with marijuana so that the galley and the pilot house were the areas left for living (R. 164-165).

Captain Rich testified about being approached on a million dollar importation deal (R. 229-230). He planned to make the trip on his boat, the "Dudley", with a crew of three men, i.e. Dennis Henry, Dennis Roth and Richard Hayden (R. 230-231). Prior to leaving, Captain Rich did not tell Petitioner Hayden what he was going to do, but said that he was going on a long boat trip for an illegal purpose (R. 231). Petitioner was told this before the boat left the dock (R. 231-232.) Petitioner

6/ There was in excess of 100 pounds of "clean" marijuana in the courtroom in front of the jury (R. 8-11).

was persistent in wanting to go even after being told that the "Dudley" was going for illegal purposes (R.249). The boat left Marathon, Florida and went to Colombia, South America to get a load of marijuana (R.232). In Colombia, the boat was anchored close to shore and the marijuana was brought out to it in small dugout boats (R. 233). Petitioner Hayden helped in loading the "Dudley" (R. 233-234). At no time did Petitioner Hayden say that he did not want to help with loading the "Dudley." (R. 236). Working for two or three hours each day, the loading took two days (R. 234). During the trip, Petitioner Hayden was seasick (R. 234,242). On the way back, he

asked to be let off as soon as possible (R. 242). The "Dudley" was to be offloaded in Florida waters on February 20th, the day before they were arrested (R. 234). Small boats were to have come out and transported the bales of marijuana (R. 234-235). While the "Dudley" was in Charlotte Harbor, Petitioner Hayden expressed a desire to get off the boat - he asked to be put in close enough to shore and he would swim (R. 235). Knowing that the boats were supposed to come out that night to unload the "Dudley", Captain Rich told Petitioner Hayden that after the offloading, Hayden could get off (R. 235). Captain Rich did not want to be sitting in the harbor with 17 tons of dope

and was apprehensive when the boats did not come out to meet the "Dudley." (R. 237-238). The proceeds of the trip were to be divided with the crew; however, prior to their arrest, Captain Rich had not talked to Petitioner Hayden about dividing up the proceeds (R. 235-236). If Captain Rich had gotten a million dollars, Petitioner Hayden's share would have been $200,000 (R. 236). While in the boat, Petitioner Hayden was offered some marijuana, but declined it, as did Captain Rich (R. 236-237). Rich could not have made the trip without a crew and while he did not need that large a crew, he was planning on sharing the cash realized from the marijuana (R. 250). As

to the marijuana itself, no one could have taken it from Rich without overpowering him, but any crew member could have some for his owm use as well as sharing in the proceeds from its sale (R. 249-250). Captain Rich said that he was still friends with Petitioner Hayden (R. 237).

Among other things, the jury was instructed as follows:

1. The charges were (1) importation and (2) possession, in excess of 100 pounds, of a controlled substance, i.e. cannabis (R. 298).

2. The charges included the lesser offenses of (1) possession,or constructive possession of cannabis in an amount more than five grams but less than a hundred pounds, and

(2) possession, or constructive possession of, less than five grams of cannabis (R. 298-299).

3. The defendant's position was stated as that the State has not proved that he had actual or constructive possession or even that he had knowledge that cannabis was aboard the ship. This was followed by an instruction that if the State has not proved both that he knew the cannabis was aboard the ship and proved that he personally possessed the substance or maintained ability to control the substance, the jury must acquit the defendant (R. 299-300).

4. The instruction on aiding and abetting was given with the caveat that in order for one to be guilty of

a crime physically committed by another, it is necessary that he had a conscious intent that the criminal act shall be done and that pursuant to that intent he do some act or say some words which were intended to and which did incite, cause, assist, or encourage another person to actually commit the crime (R. 300-301).

5. The essential elements of Count I are that defendant did knowingly and unlawfully and feloniously bring into the State of Florida a substance described in the information, i.e. cannabis, and that the substance so brought in was, in fact, cannabis (R. 301).

6. As to Count II, the essential elements are that defendant did have

actual or constructive possession of a controlled substance, i.e. cannabis, and that the substance so possessed was, in fact, cannabis (R. 301-302).

7. In addition to the definition of "possession", "actual possession" and "constructive possession" were defined, as well as "joint possession". The definition of constructive possession includes the additional element of knowledge, as well as the ability to maintain control (R. 302-303).

8. Penalty instructions were given:

(a) Count I subjected the defendant to a maximum penalty of up to five years in the state prison and/or a fine of $5000.

(2) Under Count II, the possession of more than 100 pounds of cannabis carried a penalty of up to fifteen years in the state prison and/or a fine of up to $10,000. The lesser included offense of possession of more than five grams, but less than 100 pounds, carried a penalty of up to five years and/or a fine up to $5,000. The lesser included offense of possession of less than five grams carried a penalty of up to one year in the county jail and/or a fine in the amount of $1,000 (R.303-304).

9. The instruction was given that if defendant was not guilty of possessing cannabis, then, as a matter of law, he was not guilty of bringing

it into the State (R. 304).

Petitioner was found guilty as charged as to both counts. He was sentenced on each count, with the sentences to run concurrently (R.363).

REASONS WHY THE WRIT SHOULD BE DENIED

I

CERTIORARI SHOULD NOT BE GRANTED ON THE GROUND THAT THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF CRIMINAL INTENT AND THE REVIEWING COURT'S AFFIRMANCE CONFLICT WITH THIS COURT'S DECISION IN *STROMBERG V. CALIFORNIA*, 283 U.S. 359 (1931) AND, FURTHER, INFRINGE THE RIGHT TO TRIAL BY JURY.

Petitioner asserts denial of due process and of his right to trial by jury, which claims allegedly arose from failure to instruct the jury on criminal intent as an essential element of the offenses charged. He cites *Stromberg v. California*, 283 U. S. 359 (1931) in support of his position. However, the *Stromberg* decision was predicated on a charge and jury instructions which left the door open for the accused to be convicted of a section of the law which was unconstitutional. It was unknown whether the accused's conviction was based on violation of constitutional parts of the law or of the unconstitutional section contained in the law. No such question is presented by the

instant case.

Petitioner was charged with (1) importation of contraband and (2) possession under Section 893.13,Florida Statutes (1977). He asserts that criminal intent is an essential element of the crimes charged. Therefore, he argues the failure to instruct the jury on the element of criminal intent gave rise to constitutional deprivation. Even assuming, arguendo, that this were true, relief could be had in federal habeas court. Habeas corpus will lie to set aside a conviction where the jury instruction rendered the proceedings fundamentally unfair, *Pleas v. Wainwright*, 441 F.2d 56 (5th Cir. 1971); *Higgins v. Wainwright*, 424 F. 2d 177 (5th Cir. 1970).

In any event, Petitioner's argument rests on an *a priori* assumption. In construing Section 893.13, the Florida Supreme Court held that where the statute does not specifically require criminal intent, the intent is inferred from the doing of the act. The State does not have to allege and prove intent. It is not an essential element of the crime. Lack of knowledge is an affirmative defense. However, where the possession is constructive, rather than actual, the State must prove knowledge.[7] See *State v. Medlin*, 273

7/ In the instant case, the jury was instructed as to the requisite knowledge element of constructive possession, as well as being instructed that it must find knowledge as an element of the importation charge (R. 301-303). Furthermore, the jury was instructed on the theory of the defense, to wit: lack of knowledge (R. 299-300). The jury was also told that if it found that Petitioner did not possess the contraband, it could not find that he imported it (R. 304).

So. 2d 394 (Fla. 1974).

Petitioner contends that as to the possession charge, intent is implicit in the language of Section 893.13(1)(a) 2. Granted, the jury was instructed as to the penalties for possession of contraband in excess of 100 pounds as set out in this Section. However, Petitioner was charged simply with possession of more than 100 pounds of cannabis (R.335). The information did not allege that the possession was "with the intent to sell, manufacture, or deliver", as proscribed under Section 893.13(1)(a)1. Given the language of the instant information, Petitioner was not charged pursuant to Section 893.13(1)(a)1. He was charged with mere possession under Section 893.13

(1)(e). See *Reinersman v. State*, 382 So. 2d 325 (Fla. 2d DCA 1980); *Beasley v. State*, 382 So. 2d 47 (2d DCA 1980); *State v. Brady*, 379 So. 2d 1294 (Fla. 4th DCA 1980); *Schueren v. State*, 370 So. 2d 83 (Fla. 1st DCA 1979); *Chewning v. State*, 366 So. 2d 144 (Fla. 1st DCA 1979); *Aylin v. State*, 362 So. 2d 435 (Fla. 1st DCA 1978).[8]

8/ The only question in Florida is whether one who has been charged with possession of contraband in excess of 100 pounds can be punished more severly than the third degree felony provided in Section 893.13(1)(e). The Florida Supreme Court has granted certiorari to decide whether the penalty provision of Section 893.13(1)(a)2 is applicable to the mere possession of more than 100 pounds of cannabis. This is a question of statutory interpretation. The Second District Court of Appeal held that it was not. See *Reinersman v. State, supra; Beasley v. State, supra.* The Fourt District held that the penalty of Section 893.13(1)(a)2 was applicable. See *State v. Brady, supra.* The cases pending before the Florida Supreme Court are *State v. Brady*, Case No. 59,054; *State v. Reinersman*, Case No. 59,097; *State v. Beasley*, Case No. 59, 085. In any event, this question is moot as to Petitioner. He was sentenced to four years on the possession charge (R. 563). This is within the statutory maximum of five years for a third degree felony under Section 893.13(1)(e).

On the basis of the foregoing authorities, Petitioner has wholly failed to demonstrate that the jury verdict rested upon an unconstitutional ground. He was charged with possession, the jury was instructed on the law of possession, and he was convicted of possession. It is irrelevant that the jury was instructed as to the possible penalty under Section 893.13(1)(a)2.

As to the offenses of possession and importation, the statute does not make intent an essential element of the crime. Intent is inferred from the doing of the acts.[9] Petitioner has not

9/ Respondent notes that the same type of reasoning is true of the crime of involuntary sexual battery. Intent is inferred from the doing of the act, although consent is an absolute defense (with the exception of statutory rape). There is no requirement that the jury be instructed as to intent. *Askew v. State*, 118 So. 2d 219 (Fla. 1960).

brought this case within the ambit of the first issue presented.

II

CERTIORARI SHOULD NOT BE GRANTED ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE STATE COURT CONVICTION UNDER THE STANDARD OF *JACKSON V. VIRGINIA*, 443 U. S. 307 (1979).

Respondent is unable to see how sufficiency of the evidence presents a substantial federal question upon which this Court should grant certiorari. The decision in *Jackson v. Virginia*, 443 U. S. 307 (1979), provides for federal habeas review of the evidence adduced to support a conviction. The *Jackson* rule requires that when the evidence is viewed in the light most

favorable to the prosecution, it must show guilt beyond a reasonable doubt. This question can be resolved by a petition for habeas corpus in the federal district court.

III

CERTIORARI SHOULD NOT BE GRANTED IN ORDER FOR THE COURT TO LIMIT THE STATE'S POWERS TO IMPOSE CRIMINAL SANCTIONS UPON A THEORY OF STRICT LIABILITY FOR OFFENSES SUCH AS POSSESSION OF CONTRABAND.

Petitioner seeks to have this Court grant certiorari on the ground that it violates the constitution for states to hold those who possess and import contraband as strictly liable and to impose criminal sanctions.

This question is not presented by the instant case. Under Florida law, lack of knowledge is a defense to the crime of possession. *State v. Medlin, supra.* Where the defense of lack of knowledge may be raised, absolute or strict liability is not imposed. *United States v. International Minerals and Chemical Corp.*, 402 U.S. 558, (1971).

IV

CERTIORARI SHOULD NOT BE GRANTED TO RESOLVE THE QUESTION OF WHETHER THE REQUIREMENT OF A WARRANT TO SEARCH REPOSITORIES OF PERSONAL EFFECTS FOUND IN AUTOMOBILES SHOULD BE SIMILARLY APPLIED TO THE

SEARCH OF REPOSITORIES
ABOARD A SHIP.

Following Petitioner's suit, Respondent hereby adopts in its entirety the answer to this question as filed by the state in *Larry Rich and Dennis Allen Roth v. State of Florida*, Case No. 80-557.

V

CERTIORARI SHOULD NOT BE GRANTED IN ORDER TO DETERMINE FOR THE FIRST TIME WHETHER AN UNCONSTITUTIONAL SEARCH AND SEIZURE MAY BE RESUSCITATED BY A HINDSIGHT JUDICIAL DETERMINATION OF PROBABLE CAUSE.

The instant case does not present an unconstitutional search and seizure

which was resuscitated by a hindsight judicial determination of probable cause. At the hearing on the motion to suppress evidence, the prosecutor argued that the question was whether the Marine Patrol officers had probable cause to believe there was a violation of the quality control code and he presented evidence of same.

In the alternative, Respondent adopts in its entirety the answer to this question as filed by the state in *Larry Rich and Dennis Allen Roth v. State of Florida*, Case No. 80-557.

VI

CERTIORARI SHOULD NOT BE GRANTED IN ORDER TO DETERMINE WHETHER BASIC PRINCIPLES OF ADMINISTRATIVE LAW, SPECIFICALLY

THE *CHENERY* DOCTRINE, SHOULD APPLY TO JUDICIAL REVIEW OF SEARCHES AND SEIZURES.

Respondent adopts in its entirety the answer to this question as filed by the state in *Larry Rich and Dennis Allen Roth v. State of Florida*, Case No. 80-557.

VII

CERTIORARI SHOULD NOT BE GRANTED ON THE GROUND THAT UPHOLDING THE SEARCH AND SEIZURE IN THIS CASE CONFLICTS WITH SUPREME COURT PRECEDENT AND VIOLATES THE FOURTH AMENDMENT.

The record shows that the initial boarding of the ship was supported by probable cause.

In the alternative, Respondent adopts in its entirety the answer to this question as filed by the state in *Larry Rich and Dennis Allen Roth v. State of Florida*, Case No. 80-557.

CONCLUSION

The instant petition for writ of certiorari presents no substantial federal or constitutional issue and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EULA TUTTLE MASON, Counsel for Respondent, and a member of the Bar of the United States, hereby certify that on the 18th day of December, 1980, I served three copies of the Brief of Respondent on Joseph Beeler, Esquire, Suite 900, 28 W. Flagler St., Miami, Florida 33130 by a duly addressed

envelope with postage prepaid.

Eula Tuttle Mason

EULA TUTTLE MASON
Assistant Attorney
General.